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RIGHT OF FRAUDULENT VENDEE TO SHARE WITH ATTACKING CREDITORS IN PROCEEDS OF PROPERTY AS TO DEBT UNCONNECTED WITH FRAUD.[1]

WHERE THE CONVEYANCE IS SET ASIDE IN A BANKRUPTCY OR OTHER PROCEEDING WHERE THE COURT TAKES CHARGE OF THE DEBTOR'S ENTIRE ESTATE.

In the November number (ante, p. 497), we considered the rights of the fraudulent vendee where one or more creditors successfully attack a conveyance as fraudulent in fact, without having an administration of the debtor's entire estate or even a convention of his creditors, or, as we perhaps rather loosely expressed it, in a "judgment creditors' bill" as distinguished from a "general creditors' bill," although it is so expressed in the case cited therefor. Such a bill as is filed by a single judgment creditor, or, by statutory authority, a creditor who has not obtained judgment on his debt.[2]

Having reached the conclusion in the former article that, in the ordinary cases there considered, the fraudulent grantee ought not to share as a creditor in the proceeds of the property wrested from him by the attacking creditors, basing such conclusion both on the terms of the statute of fraudulent conveyances, and the reason and spirit of the statute and the decisions, let us now consider what, if any, reason there is for a different rule in a proceeding where the court whose decree sets aside the fraudulent conveyance takes charge of the debtor's entire estate and administers it for the benefit of creditors generally, or hands it over to another court to be so administered. Such cases are "general creditors' bills" to wind up the insolvent estates of deceased persons, or the affairs of a corporation, or bills to enforce trusts or assignments for creditors, and other instances

1. Continued from ante, p. 497.
2. Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199.

where there is a community of interest, or where the law devolves upon the court the duty of taking a fund into its custody and distributing it according to the respective interests of the parties. In such cases, no priority can be acquired by one party suing or making himself a party before the others, *and, as said in one case, perhaps, one who has vainly endeavored to defeat* the purposes of the action, *may,* upon proper terms, *be allowed his share* in the fund.[3]

It will be noted that the right to share in the proceeds in such a case is predicated largely upon the inability to acquire any preference by superior diligence in such proceedings.[4]

Administration Suits.—In cases falling within the class of administration suits, it seems that even where the debt of the fraudulent grantee is immediately connected with the fraudulent

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3. Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 200. See, also, Harv. Law Rev. Oct. 1890. See Means *v.* Dowd, 128 U. S. 272, 32 L. Ed. 429.

It will be noted that Hancock *v.* Wooten was a case of a fraudulent assignment, where a creditor preferred thereby sought to share pro rata in the proceeds of the property after same was set aside, and was refused the right. It was then said: That it is undoubtedly an incident of what is ordinarily called a "general creditors' bill," that all creditors may, at any time before final decree, be allowed to come in and prove their claims. Such bills are usually instituted for the purpose of winding up the insolvent estates of deceased persons or the affairs of a corporation. "In such cases there are many parties standing in the same situation as to their rights or claims upon a particular estate or fund, and the shares of a part cannot be determined until the rights of all the others are settled or ascertained. * * * Such creditors' bills, however, are totally different from those instituted by an unsecured creditor (or several creditors if they choose to unite) against a living debtor. Here the field is open to all, and he who first secures a priority shall reap the reward of his diligence. Such bills are often said to be in the nature of an equitable fi. fa. or equitable levy (Bisp. Eq., § 528), and under them the vigilant creditor may acquire a priority as he does when he pursues the analogous remedy of execution at law. Bills of this kind are called **'judgment creditors' bills'** (see Harv. Law Rev. Oct., 1890), and are so familiar in our practice that it is hardly necessary to illustrate them by a reference to actual cases. They were entertained in equity for the purpose of subjecting equitable and other interests which could not be reached and sold under execution, and also for the purpose of removing obstructions to legal remedies, as by setting aside fraudulent conveyances and the like." Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 200.

4. Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 201.

Here the plaintiffs have been victorious, and the deed having been declared fraudulent and void, as to them, their preference must be recognized, and the claim of the losing party postponed. This, as we

conveyance or assignment, as where it is secured or preferred thereby, it is allowed to prorate with other debts, contrary to the usual rule as before shown.[5]

BANKRUPTCY PROCEEDINGS.

After these general observations, let us confine our attention in the main to the consideration of what the rule should be in a bankruptcy proceeding, treating cases of other proceedings of a similar character merely as bearing upon and throwing light on this question as to the proper rule in bankruptcy.

Let us suppose that the trustee in bankruptcy has instituted proceedings in the state court, at the instance of certain creditors, and under the direction of the referee, to set aside a fraudulent conveyance made *more than four months before* the filing of the bankruptcy petition, and the proceeds of the successful attack upon the conveyance as fraudulent in fact are now in the hands of the trustee to be distributed in the bankruptcy court.

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have said, would, perhaps, have been otherwise if there had been such a community of interest in the property as to make it the subject of a general creditors' bill, but no such result as contended for can follow where there is no such common interest, and where the property is open and subject to the action of the most vigilant creditor. Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 201.

5. **Administration suits.**—In Nadal *v.* Britton, 112 N. C. 188, 16 S. E. 915, the bill to set aside as fraudulent a conveyance to secure a debt to grantor's wife, was filed after the death of the grantor, and the proceeds were declared assets of the estate, in which the wife, as a creditor, was held entitled to share in spite of the fraud. This falls in the class of administration suits, however.

It was held that, if a deed in trust executed by a decedent to secure a debt due his wife is, at the instance of creditors, declared fraudulent and void, the real estate therein described will be sold, and the proceeds will, under Code (N. C.), § 1446, constitute assets for the payment of his debts, and, if the wife is a creditor, she will be entitled to her share of those and other assets; and in the judgment setting aside such deed it was proper to insert the claim of the wife with those of the attacking creditors. Here the conveyance had been set aside as fraudulent, and cross appeals had been taken, this one by the successful plaintiffs below because the grantee's debt had been allowed to share with them in the proceeds, and the other, on the part of defendants (see p. 914), on the ground that the finding of fraud was erroneous. The two appeals were heard at the same time and this one disallowed and the other allowed, the case being remanded for a new trial upon the question of fraud and notice thereof, but it was expressly held, as above stated, on the other appeal, that if such fraud and notice should be proved, then the claim of the fraudulent grantee would be allowed to share equally, as above stated. Nadal *v.* Britton, 112 N. C. 188, 16 S. E. 915.

Nature of Proceeding.—It has been intimated that a proceeding in bankruptcy is in the nature of a general creditors' bill, as the entire estate has to be settled among all of the creditors.[6]

Ascertainment of Debts before Distribution.—Observe the difference between a *judgment creditors' bill* to get at property fraudulently conveyed, where it is *error* to order an ascertainment of debts before a sale, except as to prior liens (at least in West Virginia), and a proceeding by an assignee in bankruptcy for the same purpose, *where such an ascertainment must* be had in order to a proper distribution of the proceeds.[7]

PROVISIONS OF THE BANKRUPTCY LAW AS TO EFFECT OF PREFERENCE OR FRAUD, AND THE CASES CONSTRUING THEM.

Act of 1898—Surrender Clause.—The bankrupt act (1898) prohibits the allowance of any claim of a creditor who has received a preference, unless he has surrendered that preference. Section 57g. If he surrenders the preference, he can claim for his debt, but if he accepted the preference innocently he cannot be compelled to return it. He has the option to keep it and forego his dividend from the bankrupt's estate.[8]

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6. Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 201.

"Our attention has been called to the case of Means *v.* Dowd, 128 U. S. 273, 32 L. Ed. 429, 9 Sup. Ct. Rep. 65. In that case the creditors secured by the fraudulent assignment were permitted to file their claims, because they were actual creditors and the estate of the bankrupt was in the custody of the law, and in this respect, as in many others, **a proceeding in bankruptcy is in the nature of a general creditors' bill.** The entire estate had to be settled among all of the creditors, and **there seems to be no positive rule of law or equity which makes the misconduct of a creditor a cause of forfeiture of his debt.** The decision, therefore, is not applicable to an action like ours." Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 201.

In Means *v.* Dowd, 128 U. S. 273, 32 L. Ed. 429, the fraud was one of law or constructive as distinguished from actual fraud (see p. 281 of opinion); i. e., the parties never had in view the ultimate loss of the unsecured creditors by their acts. In Means *v.* Dowd, the question of the right of the creditor, preferred by the constructively fraudulent assignment, to participate, was not even raised.

7. See Remington on Bankruptcy, §§ 531; 1888; 2188; Kimble *v.* Wotring, 48 W. Va. 412, 424, 37 S. E. 606; Core *v.* Cunningham, 27 W. Va. 206; Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268. See 6 Va.-W. Va. Enc. Dig. 670, et seq.

8. **Act of 1898—Surrender clause.**—Swarts *v.* Bank, 117 Fed. 1, 9.

Act of 1867.—"The bankrupt act of 1867, c. 176, 14 Stat. 517, 528, contained the following surrender clause: 'Section 23. * * * Any

This has been held, in a recent case in the federal supreme court, to mean either a voluntary or a compulsory surrender of such preference. In either case such creditor is then entitled to claim a dividend on the debt so preferred.[9]

Forfeiture Clause of 1867 Omitted from Act of 1898.—The act of 1867 contained also a "forfeiture clause," as it was called (§ 39) which is omitted from the act of 1898. This provided that when the recipient had reasonable cause to believe that a fraud on the act was intended, and that the debtor was in-

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person who, after the approval of this act shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.'" Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 366, 49 L. Ed. 790.

Clearly neither of these provisions applies to an actually fraudulent conveyance and the grantee therein, but merely to preferences forbidden by the bankrupt law. Streeter *v.* Jefferson County Bank, 147 U. S. 36, 46, 37 L. Ed. 68.

Acts of 1841 and 1800.—"Neither our bankrupt act of 1800, 2 Stat. 19, nor that of 1841, 5 Stat. 440, contained a surrender clause or any provision generally denying the right of a creditor of a bankrupt to prove his debt in the event that he had received a preference. But, under those acts, bankruptcy courts must necessarily have exercised the power of protecting the estate by preventing a creditor having an otherwise provable debt who retained that which belonged to the estate from at the same time taking dividends from it." Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 365, 49 L. Ed. 790.

9. Compulsory surrender included.—Section 57g of the Bankruptcy Act of 1898, providing that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences, means either compelled or voluntary action. Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 49 L. Ed. 790. Followed in Page *v.* Rogers, 211 U. S. 575, 29 Sup. Ct. Rep. 159, L. Ed. —, a case of an unlawful preference, not a fraudulent conveyance. It was held that the preferred creditor should be allowed to prove his claim, after being compelled to give up the preference, and deduct his dividend from the amount of the preference he is required to surrender.

A creditor of a bankrupt (under Act of 1898), who has received a merely voidable preference, and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustee, can thereafter prove the debt so voidably preferred. Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 359, 49 L. Ed. 790.

"It is argued, however, that courts of bankruptcy are guided by equitable considerations, and should not permit a creditor who has retained a fraudulent preference until compelled by a court to surrender it, to prove his debt and thus suffer no other loss than the costs of litigation. The fallacy lies in assuming that courts have power to inflict penalties, although the law has not imposed them.

solvent, "such creditor shall not be allowed to prove his debt in bankruptcy."[10]

This forfeiture clause (§ 39) had been held to take from the creditor the option to prove his claim, when the surrender was compelled by a judgment or decree at the suit of the assignee, and was not voluntary, although the original surrender clause did not.[11]

Amendment of Forfeiture Clause.—In 1874 this forfeiture clause (§ 39 of Act of 1867) was amended so as to provide that the creditor should not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt. This abol-

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Moreover, if the statute be interpreted, as it is insisted it should be, there would be no distinction between honest and fraudulent creditors, and therefore every creditor who in good faith had acquired an advantage which the law did not permit him to retain would be subjected to the forfeiture simply because he had presumed to submit his legal rights to a court for determination." Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 363, 49 L. Ed. 790.

And the weight of authority among the cases decided under the corresponding section of the Act of 1867, considered independently of § 39 (see infra), was to the same effect. Keppel *v.* Tiffin, etc., Bank, 197 U. S. 356, 368, 49 L. Ed. 790, citing In re Leland, 7 Ben. 156, and Swarts *v.* Bank, 117 Fed. 1, 9.

10. Forfeiture clause—Act of 1867.—"In § 39 of the act (1867), however, which was found under the head of involuntary bankruptcy, there was contained an enumeration of the various acts which would constitute acts of bankruptcy, and following a grant of authority to the assignees to sue for and recover property transferred, etc., by the bankrupt contrary to the act, the section concluded with the declaration that when the recipient had reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent, 'such creditor shall not be allowed to prove his debt in bankruptcy.'" Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 49 L. Ed. 790; Streeter *v.* Jefferson County Bank, 147 U. S. 36, 44, 37 L. Ed. 68.

11. Many cases under the Act of 1867, whilst treating the surrender clause as giving a creditor an alternative which he might exercise without risk of penalty or forfeiture, yet held that by the operation of § 39 upon the surrender clause the creditor lost the option to prove his claim, when the surrender was compelled by a judgment or decree at the suit of the assignee. The cases enforcing this interpretation constituted the weight of authority, and such construction may, therefore, be said to have been that generally accepted, and, in our judgment, was the correct one. These cases, which thus held that the loss of the right to prove, after compulsory surrender, arose not from the surrender clause independently considered, but solely from the operation upon the clause of § 39, are exemplified by the case of In re Leland, 7 Ben. 156, opinion of Blatchford, J. In that case, after holding (p. 162) that the prohibition of § 39 applied as well to cases of voluntary as to cases of involuntary bankruptcy, the court came to consider the surrender clause of § 23 as affected by the penalty provided for in § 39, and pointed out that by the surrender clause alone

ished the penalty, except for actual fraud, and then cut it in half.[12]

Fraud on Bankrupt Law Not in Itself Actual Fraud.—Now that the "surrender clause" (§ 57g) is the only expression of the present bankrupt law on this subject, it can be safely affirmed that actual fraud is not within its purview, and hence the rule to be applied in cases of actual fraud, in determining whether a vendee creditor, whose conveyance is set aside for actual fraud upon creditors proven, can afterwards come into the distribution of the proceeds of the property fraudulently conveyed, must be derived from the general principles of the law of fraudulent conveyances so far as adopted by the bankruptcy courts.[13]

In the present act, there is nowhere found any provision imposing even the modified penalty which was expressed in the

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the creditor would not be debarred from proving his claim if in fact there had been a surrender, whether voluntary or not, but that as a result solely of the prohibition of § 39 the creditor would be barred after recovery by the assignee. Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 368, 369, 49 L. Ed. 790. See Swarts *v.* Bank, 117 Fed. 1, 9.

12. Amendment of forfeiture clause.—"Section 5021, as amended in 1874 (act of June 22, 1874, 18 Stat. 178, 181, c. 390, § 12), is as follows: 'Provided, that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended, and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt, and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy.' " Streeter *v.* Jefferson County Bank, 147 U. S. 36, 45, 37 L. Ed. 68; Keppel *v.* Tiffin, etc., Bank, 197 U. S. 356, 370, 49 L. Ed. 790.

Plainly, this amendment not only abolished the penalty provided in § 39 as originally enacted, since it allowed a creditor to prove his claim for the whole amount thereof after recovery against him if he had not been guilty of actual fraud, and even in case of actual fraud, after recovery permitted him to prove for a moiety. Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 370, 49 L. Ed. 790.

The meaning of the amendment of 1874 was considered by the court of appeals of New York in the case of Jefferson County National Bank *v.* Streeter, 106 N. Y. 186. The New York court expressly adopted the construction that the amendment was remedial and intended by congress to mitigate, even in cases of actual fraud, the severity of the prohibition of § 39 as originally enacted, and its action in so doing was affirmed by the federal supreme court in Streeter *v.* Jefferson County Bank, 147 U. S. 36, 37 L. Ed. 68. Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 372, 49 L. Ed. 790.

13. Fraud on bankrupt law not in itself actual fraud.—Streeter *v.* Jefferson County Bank, 147 U. S. 36, 46, 37 L. Ed. 68. See, also, Keppel *v.* Tiffin, 197 U. S. 356, 370, 49 L. Ed. 790.

"The state court (Bank *v.* Streeter, 106 N. Y. 186) cites with approval the case of In re Riorden, 14 Nat. Bank. Reg. 332, in which it was

amendment of 1874. The contention that because the act of 1898 contains a surrender clause, therefore it must be assumed that congress intended to inflict the penalty originally imposed by § 39 of the act of 1867 must rest upon the erroneous assumption that that penalty was the result of the surrender clause alone.[14]

TRUSTEE AS REPRESENTATIVE OF CREDITORS.

The trustee stands in the shoes of the creditors and only exercises their rights.[15]

Right of Trustee to Avoid Liens or Transfers—Extent.—The Bankrupt Act of 1898 does not vest a trustee with any better

held by Mr. Justice Blatchford, then sitting as District Judge, that a mere fraud on the bankrupt law, by the acceptance of a preference, was not, in itself, actual fraud; and, commenting on this decision, the court said: 'Such conclusion seems just and equitable. The bringing of an action by a creditor in the ordinary mode of procedure in the state courts, and procuring a judgment, may be, as in this case, constructive fraud, for which the lien will be set aside. But even that will depend upon the further fact that bankrupt proceedings shall be instituted within the limited time provided by law. If such proceedings are not so begun, the lien would be valid and effectual. How, then, can it be construed to be actual fraud to pursue a legal remedy which may be efficacious, and especially when no action of the bankrupt debtor gives the creditor the obnoxious preference?' (Record. This case is not reported. See 36 Hun. 640.)" Streeter *v.* Jefferson County Bank, 147 U. S. 36, 46, 37 L. Ed. 68.

In Keppel *v.* Tiffin, etc., Bank, 197 U. S. 356, 370, 49 L. Ed. 790, stress is laid in the opinion upon the fact that there was no fraud in fact, but merely a voidable preference.

14. Present act imposes no penalty in terms.—Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 372, 49 L. Ed. 790.

And, irrespective of this irresistible implication, a general consideration of the present act persuasively points out the purpose contemplated by congress in refraining from re-enacting the penalty contained in § 39 of the act of 1867. Undoubtedly the preference clauses of the present act, differing in that respect from the act of 1867, as is well illustrated by the facts of this case, include preferences where the creditor receiving the same acted without knowledge of any wrongful intent on the part of the debtor and in the utmost good faith. Pirie *v.* Chicago Title & Trust Co., 182 U. S. 438, 454, 45 L. Ed. 1171. Having thus broadened the preference clauses so as to make them include acts never before declared by congress to be illegal, it may well be presumed that congress, when it enacted the surrender clause in the present act, could not have contemplated that that clause should be construed as inflicting a penalty upon creditors coming within the scope of the enlarged preference clause of the act of 1898, thereby entailing an unjust and unprecedented result. Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 373, 49 L. Ed. 790.

15. Trustee as representative of creditors.—In re International Mahogany Co., 147 Fed. Rep. 147.

The trustee succeeds to the bankrupt's title and stands in his shoes and takes the property, **in cases unaffected by any fraud of the bank-**

right or title to the bankrupt's property than belonged to the bankrupt or to his creditors at the time when the trustee's title accrued. Sections 67a, 67b, providing that claims which, for want of record, or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate, and that whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards becomes a bankrupt, the trustee may enforce such rights for the benefit of the estate; and § 70e, providing that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, are designed to subrogate the trustee to rights of creditors, as against liens or transfers, which exist at the time of the bankruptcy, but they vest him with no additional rights. If a lien was invalid as to one creditor, but valid as against others, or if one creditor only was in position to enforce his rights as against it, the trustee can avoid it only to the extent of the claim of such creditor.[16]

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rupt towards creditors, in the same plight and condition in which the bankrupt held it and subject to all equities and rights imposed upon it in the hands of the bankrupt, except where there has been some conveyance or encumbrance of the property or seizure of it by egal process, void as against the trustee by some provision of the Bankrupt Act. Rem. on Bankruptcy, § 1144, citing Thompson *v.* Fairbank, 13 A. B. R. 445, 196 U. S. 516, 526, where it is said: "Under that law (of 1867) it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, and that 'except where, within a prescribed period before the commencement of proceedings in bankruptcy, an attachment has been sued out against the property of the bankrupt, or where his disposition of his property was, under the statute, fraudulent and void, his assignee take his real and personal estate, subject to all equities, liens, and encumbrances thereon, whether created by act or by operation of law.' Yeatman *v.* New Orleans Sav. Inst., 95 U. S. 764. See, also, Stewart *v.* Platt, 101 U. S. 731; Hauselt *v.* Harrison, 105 U. S. 401."

16. Right of trustee to avoid liens or transfers—Extent.—In re New York Economical Printing Co., 110 Fed. Rep. 514.

Now, it is fundamental in law that a debtor cannot himself avoid his own fraudulent conveyance, this being so because the fraudulent conveyance gives a good title against him and no court will listen to his plea for declaring it null nor let him so stultify himself as to say he transferred it fraudulently and now wants it back. So it is only creditors who can avoid fraudulent conveyances, although in a qualified sense the debtor still has the title. Andrews *v.* Mather, 9 A. B. R. 299, 134 Ala. 358: "Although property which has been fraudulently conveyed ceases to belong to the grantor, so far as any claim he himself can set up is concerned, yet the law regards property which has been fraudulently conveyed as still the property of the grantor, so far as creditors are concerned. The assignee in bankruptcy is an officer

Action under § 67 (e) and § 70 (e) Compared.—Fraudulent conveyances made within four months of the filing of the petition are to be attacked by the trustee under § 67 (e) and when brought in become assets of estate for benefit of all creditors. Fraudulent conveyances made prior to that, when attacked by the trustee, come under § 70 (e), and the property conveyed is recovered in right of the creditor who could have assailed it under the state law and had bankruptcy not intervened, and with the same results and ensuing rights in the proceeds that would have attached had that been the case.[17]

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created for the benefit of creditors, and he is permitted to regard property fraudulently conveyed in the same way in which creditors are permitted to regard it." Chesapeake Shoe Co. *v.* Seldner, 10 A. B. R. 466, 473, 122 Fed. 593 (C. C. A. Va.): "As between the bankrupt and his fraudulent grantee, the bankrupt has no title and to give any effect, or even meaning to Clause 4 (§ 70) we must construe the words 'title of the bankrupt' as between the bankrupt and his creditors." Rem. on Bankruptcy, § 1138, p. 665.

Though but one creditor in position to object, yet trustee may object.—Where only one or less than all of the creditors is in a position to object to the claim, nevertheless the trustee succeeds to such creditor's defense and may urge it, even if the creditor himself does not urge it. Instance: In re Royce Dry Goods Co., 13 A. B. R. 267, 133 Fed. 100 (D. C. Mo.), where it was said: "When this claim was presented for allowance, the wronged creditors unquestionably had the right to object thereto on the ground that the claimant was estopped to deny the truth of his representations. If so, why may not the trustee for them?" But it hardly seems correct to hold that where a claim is good as against all the other creditors and is bad only as to the one, yet that it may be thrown out altogether. A better rule it would seem would be to make it the subject of a special order in the distribution, and adjust the priorities in the dividends in accordance with the respective equities; and postpone such claimant's dividend, or subject it to such creditor's claim. Remington on Bankruptcy, § 828. Obiter dictum, In re Royce Dry Goods Co., 13 A. B. R. 627, 133 Fed. 100 (D. C. Mo.). See post, "Court's Power to Adjust Equities and to Punish Fraud."

17. Remington on Bankruptcy, §§ 1138, 1216. Beasley *v.* Coggins, 12 A. B. R. 355, 48 Fla. 215, 57 So. 213; In re Taylor, 95 Fed. 956.

Property recovered by the trustee under § 67 (e) would certainly seem to be assets for the benefit of **all creditors,** unless the fraudulent grantee is cut out by his fraud, but this only applies to conveyances within the four months. As to conveyances before that, § 70(e) must alone govern, and that seems limited to the same effect as any such suit by a creditor independent of any bankruptcy proceeding. See In re Hill, 140 Fed. 981.

Fraudulent transfers, and property held on secret trust, recoverable.—Property fraudulently conveyed or held on secret trust for the debtor, so far as the same would have enured to the benefit of creditors without bankruptcy, is recoverable by the trustee in bankruptcy, and the transaction may be set aside. Bush *v.* Export Storage Co.,

Subdivision § 70, "e" ("the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided"), like the other provisions, does not author-

14 A. B. R. 141, 136 Fed. 918 (C. C. Tenn.): "But besides this class of transfers made void by the Bankrupt Act itself, as being against its policy of equal and fair distribution, the bankruptcy law (§ 70a, subsec. 4, 30 Stat. 566), provides that the trustee shall be vested by operation of law with any property transferred by the bankrupt in fraud of his creditors, the precise language of the Act being 'transferred by him in fraud of his creditors.' There is no four months limitation on this class of transfers, and this provision includes fraudulent conveyances which are so by the common law, by statute law, and by any other recognized rule of law of the state. Loveland on Bankruptcy (2d Ed.), § 158, and cases cited. Of course, the fraudulent bankrupt is without right to set aside a conveyance made by him in fraud of his creditors. It is valid between the parties, but, by operation of the very terms of the Act, the right which before bankruptcy belonged to the creditors passed from them, and is vested in the trustee." Beasley *v.* Coggins, 12 A. B. R. 355, 48 Fla. 215, 57 So. Rep. 213. Remington on Bankruptcy, § 1216.

Section 70 (a) to be construed with cognate sections—Trustee gets more than bankrupt's title and rights.—The statute, in § 70 (a), declares that the title taken by the trustee is the title that the bankrupt had, but this clause must be read in conjunction with other sections of the statute and with two other parts of the same section, otherwise a wholly insufficient idea of the complete title and rights of the trustee will be had. (In re Thorp, 12 A. B. R. 202, D. C. Va.) It is true the title which the trustee takes is that of the bankrupt. But his rights are those of the bankrupt and more. He has, by the positive provisions of the Act, the further rights which any creditor had by state law at the time of the bankruptcy, to set aside fraudulent transfers or liens and to expose the resultant title of the bankrupt. In addition thereto he has the special rights conferred by the bankruptcy law itself in protection of the insolvent estate and its preservation as a trust fund for the benefit of all creditors, namely, the peculiar rights of avoiding preferential transfers and liens obtained by legal proceedings within the four months preceding the bankruptcy. Citing Beasley *v.* Coggins, 12 A. B. R. 358, 48 Fla. 215, where it is said: "Section 70 (e) was intended to provide simply that the trustee in bankruptcy should have the same right to avoid conveyances as was possessed by creditors, or any of them, and this with especial reference to the Statute of 13 Elizabeth. Under the Bankruptcy Act, when one is thereunder adjudged a bankrupt, creditors are not permitted to attack fraudulent conveyances of their debtor, made more than four months of the adjudication of bankruptcy; and, if the trustee could not do so, then the act would constitute a device to permit fraudulent conveyances to take effect with impunity, in case they are successfully concealed for the specified four months. It is only by holding that the trustee is subrogated to the rights of creditors against a fraudulent conveyance that full effect and operation can be given to the Statute of 13 Eliz. against fraudulent conveyances, from which our statute is substantially taken." Rem. on Bankruptcy, §§ 1138, 1216; Thomas *v.* Roddy, 107 N. Y. Sup. 473; In re Taylor, 95 Federal Rep. 956.

In view of the fact that all property fraudulently conveyed passes

ize the trustee to avoid a transfer unless some creditor might have avoided it.[18]

The trustee represents all the creditors. His action is for the benefit of them all, but it is not necessary that all or any of

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to the trustee by operation of § 70 of the Act, it is evident no reason for the adding of this § 67 (e) could have existed had it not been that by this peculiar provision conveyances, transfers and encumbrances made by the bankrupt within the four months preceding bankruptcy are void, even if made with merely his own intent to hinder, delay and defraud creditors, unless the transferee prove his own good faith and adequate consideration. At common law and under the statutes, except this bankruptcy statute in its § 67 (e), a prima facie case for setting aside a transfer as fraudulent is not complete unless proof be made by the creditor of the transferee's participation in the fraudulent intent; and a suit to set aside a fraudulent conveyance may fail precisely because of this inability to prove affirmatively the transferee's participation in the fraudulent intent. By this provision of § 67 (e), then fraudulent conveyances within the four months are voidable if made with solely the debtor's intent to hinder, delay or defraud creditors, even if there be no participation of the transferee in the intent, unless the transferee himself prove his own good faith and his giving of a present, fair consideration therefor. Remington on Bankruptcy, § 1493.

18. In re N. Y. Economical Printing Co., 110 Fed. 514, 518.

In the case of In re Gray, 47 App. Div. 554, 62 N. Y. Supp. 618, 3 Am. Bankr. Rep. 647, this identical question came before the appellate division of the supreme court of New York, wherein it was decided that § 70e of the bankruptcy act conferred the right to set aside fraudulent conveyances of property made prior to the four months' period upon the trustee, pursuant to pre-existing rights of creditors. The second point of the syllabus in that case is: "Section 67e embraces all acts within the four months which are voidable as matters of fact or of law, and the trustee's right to have transfers annulled thereunder is conferred upon him by the due operation of the bankruptcy law, and is irrespective of whether any other person might or might not have had that right, except for that law. But when, under § 70e, the trustee seeks to set aside a fraudulent or voidable transfer of the bankrupt antedating the four months, he does so in the creditor's common-law right to which he is subrogated, and which is vested in him exclusively." Kuhl-Koblegard Co. *v.* Gillespie, 61 W. Va. 584, 56 S. E. 898; 10 Lawyers' Reports Annotated, 309.

It will be observed that in this action there is no four months' limitation as in the other sections above referred to. Its effect is to subrogate the trustee to the rights of creditors. Its distinguishing feature is that it authorizes a trustee in bankruptcy to invoke the relief furnished by state laws to creditors for annulling transfers of property by their debtors. See In re William H. Gray (Sup.), 3 Am. Bankr. Rep. 647, 62 N. Y Supp. 618; Skillen *v.* Endelman (Sup.), 11 Am. Bankr. Rep. 766, 79 N. Y. Supp. 413; Collier on Bankruptcy (6th Ed.) 613; Loveland on Bankruptcy (3d Ed.) § 158; Bush *v.* Export Storage Company (C. C.), 136 Fed. 918. Manning *v.* Evans, 156 Fed. Rep. 106, 110.

Under the law of New Jersey, it is not unlawful for an insolvent debtor to prefer a creditor by a transfer of property, if made in good

them should be in a position to attack the transfers or that the transfers should be fraudulent as to all. If fraudulent as to any, that is sufficient.[19]

If the utmost rights that a creditor can have under the bankruptcy law (or that the trustee can exercise for him under § 70e) are such rights as he would have had *as creditor* independently

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faith and for an adequate consideration, and the trustee of a bankrupt cannot set aside such a transfer made by him under Bankr. Act, July 1, 1898, c. 541, § 70, 30 Stat. 566 (U. S. Comp. St. 1901, p. 345), which gives the trustee the right to avoid any transfer which might have been avoided by creditors. Manning *v.* Evans, 156 Fed. Rep. 106.

19. The trustee represents all the creditors.—Thomas *v.* Roddy, 107 N. Y. Sup. 473, 478. This is a quotation from the opinion, but it is obiter dictum. The question was as to the right of the trustee to maintain the suit, and not as to whom the proceeds should go.

The bankrupt act vests the assignee with title to all property conveyed by the bankrupt in fraud of creditors, and he may proceed to recover the interest of the bankrupt in the property, if any such creditor might have avoided it but for the bankruptcy proceedings, whether any creditor was in position to attack the transfer or not. Sheldon *v.* Parker, 92 N. W. 923, reaffirmed in 95 N. W. 1015.

Under Bankr. Act, July 1, 1891, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vesting a bankrupt's trustee with title to all property of the bankrupt transferred in fraud of creditors, and authorizing the trustee to avoid any transfer which any creditor of the bankrupt might have avoided, etc., a trustee may sue to set aside a fraudulent conveyance made by a bankrupt more than four months prior to the filing of a bankruptcy petition, without showing that some creditor of the bankrupt between the disposition of the property and the filing of the petition in bankruptcy had placed himself in a position to attack the fraudulent transfers by obtaining a judgment and issuing an execution and having the same returned unsatisfied. Thomas *v.* Roddy, 107 N. Y. Sup. 473.

The fact that creditors of a bankrupt had acquired a lien on property fraudulently transferred more than four months prior to the filing of the bankruptcy petition, and were entitled to sue notwithstanding the bankruptcy proceedings to set aside such fraudulent conveyance, did not deprive the bankrupt's trustee from maintaining a similar suit, especially where such creditors had not sued, and did not object to the proceedings by the trustee to which they were made parties. Thomas *v.* Roddy, 107 N. Y. Sup. 473.

To the objection that the creditors whom the trustee represents have not exhausted their legal remedy, and that the suit cannot be maintained on this account, it is sufficient to say that the law under which the trustee was appointed authorized him to bring and maintain actions of this character. Platt *v.* Matthews (D. C.), 10 Fed. 280; Mueller *v.* Bruss (Wis.), 88 N. W. 229; Hood *v.* Bank (Neb.), 91 N. W. 701. Sheldon *v.* Parker, 92 N. W. 923, 930, reaffirmed in 95 N. W. 1015. See post, "Effect of State Law as to Distribution and Rights of Creditors."

It is also instructive to note the different wording of § 67e from § 70e, in that the former expressly says that the proceeds become "assets and estate" "for the benefit of the creditors," while the latter says nothing of the kind.

thereof, then how, it is submitted, can the fraudulent grantee come into the bankruptcy court and ask for rights in the proceeds as creditor, such as we think we have shown he could not possibly have claimed consistently with the true principles of law, had not bankruptcy intervened? To ask this question seems almost to answer it.

EFFECT OF STATE LAW AS TO DISTRIBUTION AND RIGHTS OF CREDITORS.

The suit to avoid the transfer was brought in the state court, under the state law, and the rights of creditors among themselves in respect to such property or its proceeds, are to be determined by state law unless the bankruptcy law lays down a different rule, as it does not here.[20]

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20. Effect of state law as to distribution and rights of creditors.—In controversies arising under a state statute as to fraudulent conveyances, involving, as they do, the rights of creditors locally, and a rule of property, the federal courts accept and follow the conclusions of the highest judicial tribunal of the state as controlling. Schreyer *v.* Scott, 134 U. S. 405, 409, 33 L. Ed. 955; Peters *v.* Bain, 133 U. S. 670, 686, 33 L. Ed. 696, and other cases cited in 6 U. S. E. 1087; In re Economical Printing Co., 110 Fed. 514, 518; Barber *v.* Coit, 144 Fed. 381.

Validity of claims determined, in general, by state law.—Unless repugnant to the peculiar provisions of the Bankrupt Act, the validity of claims is to be determined by the law of the state. Remington on Bankruptcy, § 780, citing First Nat'l Bk. *v.* Altman, Miller & Co., 12 A. B. R. 12 (Ref. Ohio); In re Tucker, 12 A. B. R. 594, 131 Fed. 647 (D. C. Mass.); In re Trombly, 16 A. B. R. 599 (Ref. Vt.). But compare, contra, as to wife's claims in Massachusetts, James *v.* Gray, 12 A. B. R. 573, 131 Fed. 401 (C. C. A. Mass.), refusing to follow In re Talbott, 7 A. B. R. 29, 110 Fed. 924 (D. C. Mass.).

It is said in Rem. on Bankruptcy, § 801, that, in general, claims are allowable in bankruptcy if they be provable, and if they be by state law valid. Citing numerous cases.

The validity and allowability of claims to share in the distribution of the assets, is to be determined according to state law, where no provisions of the Bankrupt Act are controlling. Hiscock *v.* Varick National Bank, 206 U. S. 28, 36, 51 L. Ed. 28.

Claims tainted with illegality or fraud.—Claims are not allowable in bankruptcy that are invalid under state law because of illegality or fraud. Thus, as to claims tainted with usury. Rem. on Bankruptcy, § 803, citing In re Robinson, 14 A. B. R. 626, 136 Fed. 430 (D. C. Mass.); a usury case.

See In re Worth 12 A. B. R. 570, 130 Fed. 927 (D. C. Iowa), where it is said: "The notes * * * being Iowa contracts, and payable in Iowa, are to be governed by the laws of that state relating to usury." See In re Talbott, 7 A. B. R. 29, 110 Fed. 924 (D. C. Mass.): "The provability of a wife's claim must depend upon its enforceability, either at law or in equity in the courts of the state."

Liens and rights acquired under state laws are unimpaired.[21]

Property Liable under State Law.—The evident intent and purpose of the bankruptcy act is that all property which, under the laws of the state, may be resorted to for the satisfaction of the bankrupt's debts, shall pass to the trustee as the representative of all the creditors.[22]

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21. Liens and rights under state laws.—"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee; and if it is one which was invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor. The provisions which have been quoted do not necessarily touch a lien which at the date of the adjudication of bankruptcy was valid as to the bankrupt, and could not then be disturbed by any of his creditors." In re New York Economical Printing Co., 110 Fed. Rep. 514, 518. See ante, "Trustee as Representative of Creditors."

Where the property of a bankrupt was covered by an unrecorded chattel mortgage, and on the sale of the property by the trustee the proceeds were insufficient to pay the claims of creditors of the bankrupt, who became such after the execution of the mortgage, and Code S. C., § 2456, provides that mortgages shall be valid, so as to affect the rights of subsequent creditors, only when recorded: Held, that as the mortgage was valid as against the creditors of the bankrupt, who were such when the mortgage was given, but was invalid as against all subsequent creditors, the fund arising from the property should be distributed among such subsequent creditors, to the exclusion of both the antecedent creditors and the mortgagee. In re Cannon, 121 Fed. Rep. 582. See, also, Stewart *v.* Platt, 101 U. S. 731, 25 L. Ed. 816.

Also governs validity, except where peculiar rights as to preferences, liens by legal proceedings, etc., conferred by act itself, involved.—Where not affected by the peculiar provisions of the Bankruptcy Act, the law of the state will control in bankruptcy as to the validity of mortgages and other liens, and as to ownership and other interests in property. Rém. on Bankruptcy, § 1140, citing Dodge *v.* Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.). Compare similar rule as to allowability of claims, ante, § 730. Young *v.* Upson, 8 A. B. R. 377, 115 Fed. 192 (D. C. N. Y.): Statute making presumptively fraudulent, assignments of "goods and chattels" not accompanied with delivery, does not apply to assignments of book accounts as collateral. In re Tice, 15 A. B. R. 97, 139 Fed. 58 (D. C. Pa.); In re Beede, 14 A. B. R. 697, 138 Fed. 441 (D. C. N. Y.); In re Gosch, 9 A. B. R. 613 (D. C. Ga.), Thompson *v.* Fairbanks, 13 A. B. R. 442, 196 U. S. 516. See, also, Remington on Bankruptcy, §§ 2188, 2205.

22. Property liable under state law.—In re Taylor, 95 Fed. Rep. 956, 957.

Jurisdiction Concurrent.—The jurisdiction is concurrent with the state courts, and the rules of law are, as they should be, ordinarily the same,[23] and the jurisdiction and the remedies and relief afforded in the state court are governed by the the laws of the state.[24]

COURT'S POWER TO ADJUST EQUITIES AND PUNISH FRAUD.

Under the power of the court to adjust the equities existing among general creditors, it has been held that the claims of creditors who have not been guilty of preferences voidable under the peculiar provisions of the Bankruptcy Act, but have been guilty of conduct which, under the ordinary rules of equity, would make it inequitable for them to share in the dividends on an equality with other creditors, may be postponed to the claims of other creditors in the distribution of dividends.[25]

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23. Jurisdiction concurrent.—A controversy between trustees in bankruptcy and parties in possession of property under a conveyance by the bankrupt, which the trustee alleged to be fraudulent as to creditors, is a controversy in law or in equity, under § 23, and not a proceeding in bankruptcy within the jurisdiction of the district court. But the jurisdiction to determine it is in a circuit court of the United States or a state court obtaining jurisdiction. Bardes *v.* Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175; In re Rochford, 124 Fed. Rep. 182, 185.

24. Laws of state applicable.—Under Bankr. Act, July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), authorizing the trustee to recover a preference (and the same is applicable to a fraudulent conveyance), and providing that any state court which would have had jurisdiction, if bankruptcy had not intervened, shall have concurrent jurisdiction, where a trustee in bankruptcy seeking to recover a preference elects to bring the proceeding in the state court, the jurisdiction of the state court is governed by the laws of the state. Detroit Trust Co. *v.* Old National Bank of Grand Rapids, 118 N. W. 729.

A trustee in bankruptcy must, in certain cases, resort to the courts of the state to recover property of the bankrupt fraudulently conveyed. In such cases he is entitled to all remedies and all relief that would be afforded any other party litigant under the same facts. Sheldon *v.* Parker, 92 N. W. 923, reaffirmed in 95 N. W. 1015.

25. Court's power to adjust equities and punish fraud.—Rem. on Bankruptcy, § 2220, citing In re Siegel-Hillman Dry Goods Co., 7 A. B. R. 351 (D. C. Mo.), reversed in Swarts *v.* Siegel, 8 A. B. R. 689, 117 Fed. 13); In re Royce Dry Goods Co., 13 A. B. R. 267, 133 Fed. 100 (D. C. Mo.). In the last-named case it was suggested that the dividend on the claim of the president of the bankrupt corporation should be subjected to the priority of the claim of a creditor who had been misled by the false statements of the president as to the assets and had suffered loss in consequence. Compare, In re Rochford, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.).

It is said in Remington on Bankruptcy, § 782, that the right of one

And when a creditor by fraud will attempt to defeat the claims of other creditors, there is no hardship in postponing his demand, although a just one, to those which he has endeavored to defeat.[26]

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creditor to object to another's claim is not limited to objections which the bankrupt might himself have raised, but includes those where the transaction either contravenes the bankrupt law, or where the transaction would be void against creditors had there been no bankruptcy proceedings; otherwise, however, the creditor is restricted to objections which the bankrupt himself might have raised. Citing In re Arnold & Co., 133 Fed. 789, as a case in which the rule limiting the creditor is stated too broadly.

"The administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by act of congress it becomes a branch of equity jurisprudence. Bardes *v.* Hawarden Bank, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Swarts *v.* Siegel, 54 C. C. A. 399, 402, 117 Fed. 13, 16. Property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who the lawful owners of it are, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or interest in the property in its custody, or in its proceeds, is a power inherent in every court of equity, incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds. Chauncey *v.* Dyke Brothers, 119 U. S. Fed. 1, 3, 55 C. C. A. 579." In re Rochford, 124 Fed. Rep. 182, 187. See also ante, "Trustee as Representative of Creditors."

26. Same.—State *v.* Hope, 102 Mo. 431, 14 S. W. 990. "It is the established doctrine of this state (Missouri) that the priority of an execution creditor who acts in collusion with the execution debtor may be avoided on motion after the return of the execution." In re Headley, 97 Fed. Rep. 765, 770.

Example.—Where a national bank bought a judgment of record against one of its debtors, paying much less than its face value, and caused execution to be issued thereon and levied on the debtor's goods, under a secret arrangement between the parties that the execution, after reimbursing the bank for the amount actually advanced, should be managed for the benefit of the debtor, so as to protect him against his other creditors, and with the result of delaying and defrauding the latter, and within four months thereafter the debtor was adjudged bankrupt, and the bank proved a claim against his estate for the whole amount of the judgment, and had the same allowed, held, that such allowance should be set aside, and the claim of the bank postponed to the claims of other creditors. In re Headley, 97 Fed. Rep. 765.

"Under all the authorities, this was a fraudulent combination and scheme, which should postpone the claim of said bank for the amount of said judgment against the bankrupt estate. The bankrupt law is administered upon lines of equity jurisprudence, and, as between contending creditors, the bankrupt court, in the interest of fair dealing and good conscience, has the unquestioned power to postpone the claim of such a creditor in favor of the other creditors." In re Headley, 97 Fed. Rep. 763, 770.

Fraudulent sale of pledge as working disallowance of claim secured. —Bankr. Act, July 1, 1898, c. 541, § 57, subd. "h," 30 Stat. 560 (U. S.

Comp. St. 1901, p. 3443), provides that the value of securities held by secured creditors shall be determined by converting them into money according to the terms of the agreement, or by arbitration, compromise, or litigation, as the court may direct, and that the amount of such value shall be credited on the claims, and a dividend paid only on the unpaid balance. Held, that where a creditor of a bankrupt firm held insurance policies on the life of one of its members of the face value of $60,000 as security, it had no authority to sell the same to itself at a pretended sale at auction for $10,250, after a petition in bankruptcy had been filed against the firm, but before adjudication, without other authority than the contract of pledge, and without notice to the pledgors or other parties in interest. A sale so fraudulently made warranted the disallowance of the creditor's claim secured by the policies, and an order prescribing a method for ascertaining the value of such policies. In re Mertens, 134 Fed. Rep. 101.

Fraudulent representations.—It has been held, most justly, that where a creditor has assisted his debtor to fraudulently procure a loan, in the proceeds of which he has shared, he cannot afterwards prove the remainder of his debt in bankruptcy until such creditor is paid in full. In re Ewald, 135 Fed. 168.

Thus, the creditor holding an unrecorded chattel mortgage securing his debt, at whose instance the debtor obtained a loan from another party on a written statement showing his property free from encumbrance, and who received part payment of his debt from the proceeds, will be postponed in bankruptcy, as to the remainder of his claim, to the debt of the bank. In re Ewald, 135 Fed. 168.

But the act of a creditor in withholding from record a chattel mortgage securing his debt, by agreement with the mortgagor, until the latter's bankruptcy, while it may render the mortgage invalid as a lien as against subsequent creditors without notice, does not of itself affect his right to prove his debt in bankruptcy, nor subordinate it to the claims of subsequent creditors. In re Ewald, 135 Fed. Rep. 168.

"The bankruptcy law is founded and administered upon the principles of equity, and it would be clearly inequitable to permit a creditor who by a false and fraudulent statement, purposely made or caused to be made by him, had induced another to extend credit to his insolvent debtor, and had profited thereby, to share equally with the one whom he had thus defrauded in the distribution of the bankrupt's estate. Equity will not permit this to be done, but will postpone the claim of the creditor who has thus defrauded the other to the claim of the latter in the distribution of the bankrupt's estate." In re Ewald, 135 Fed. Rep. 168, 171.

Fraudulent mortgage as vitiating entire claim.—Where a debtor, apprehending the recovery of damages against him in a suit for negligence, and intending to deceive the plaintiff therein and protect his property from execution, gave his note to one of his creditors for a sum largely in excess of the amount honestly due and secured the same by a chattel mortgage covering all his personality, and such creditor, with knowledge of the facts, recorded the mortgage, and filed an affidavit that the entire amount of the note was justly due, and the debtor afterwards became bankrupt, held, that the mortgage could not be enforced as a lien against the bankrupt's property, even

Other Decisions Denying or Allowing Right of Transferee to Prorate.—It has been intimated, in a case allowing reimburse-

ment of consideration where there was only constructive fraud, that actual fraud might debar the grantee from participation.[27]

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to the extent of the original bona fide claim; the whole transaction being vitiated by fraud. In re Hugill, 100 Fed. Rep. 616.

It is no answer to this to say that no one lost anything by this transaction. It is sufficient to look to the motive and purpose of the maker of the note and mortgage, to see what his intent was, which was evidently to hinder and delay his creditors. The referee was correct in his conclusions that the instruments were fraudulent, and that the holders thereof ought not to participate to any exent in the distribution of this bankrupt's estate. In re Hugill, 100 Fed. Rep. 616, 618.

Good faith required.—Every person seeking any benefits under the bankruptcy law must act in the utmost good faith, and if a creditor attempts to obtain any advantage over any other creditor by fraudulent conduct, he must suffer the consequences. All creditors are supposed to stand upon an equal footing before the law, and the act is replete with provisions which seek to secure equality for all creditors. Under § 57g, the claim of any creditor who has innocently received a preference must be disallowed until the preference is surrendered. Certainly it is within the intent, if not the strict letter, of the act that he who has attempted to receive a preference by fraud shall not be allowed to participate in the fund distributed. The presentation of a false claim, by § 29b, cl. 3, is made a penal offense, which shows how the law would regard one guilty of such an act. In re Elder, Fed. Cas. No. 4,326; Marrett *v.* Atterbury, Fed. Cas. No. 9,102; In re Stevens, Fed. Cas. No. 13,365. In re Flick, 105 Fed. 503, 507.

Where one creditor of a bankrupt has attempted to obtain an advantage over others, by fraudulently including in his account fictitious items or incorrect amounts, he forfeits his right to have his claim allowed in any sum. In re Flick, 105 Fed. Rep. 503.

27. Constructive fraud.—In Barber *v.* Coit, 144 Fed. 381, the vendee in a conveyance set aside in the state court as constructively fraudulent, at the suit of a creditor, was allowed by the bankruptcy court, into whose hands the proceeds came, to claim for the full amount of the consideration he had paid and of which the creditors had received the full benefit. A sufficient reason for this will be found in the fac that there was no finding of actual fraud and the creditors had the benefit of the consideration paid. See Remington on Bankruptcy, § 775.

Under these circumstances, since the creditors have received the full benefit of the money which vendee paid, and since vendee has nothing to show for this money, the property which he received in exchange having been taken away from him and handed over to the trustee for the benefit of the creditors, it seems that he has a valid claim against the trustee for the full amount of the money he paid, less the expenses of setting aside the sale. The creditors lose nothing they are justly entitled to by giving up the money, for they have the property, and it would be manifestly inequitable for them to hold both property and money. Barber *v.* Coit, 144 Fed. Rep. 381, 383.

"That a creditor, preferred by a conveyance constructively fraudulent, may, after the preference is set aside, nevertheless prove the debt so voidably preferred, was held in Keppel *v.* Tiffin Sav. Bank,

And it has been held that he cannot claim reimbursement of consideration paid, where he has been guilty of actual fraud.[28]

When a creditor of a bankrupt participates in a scheme to defraud other creditors, and in furtherance thereof advances money or incurs expense, the entire transaction is contaminated by the fraud, and the court will not assist the conspirators by allowing claims for such advances against the estate. This practically means that a bankruptcy court will not allow a claim for the re-

197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790." Barber *v.* Coit, 144 Fed. 381, 383. See, also, Bradford *v.* Beyer, 17 O. St. 389, 394.

Means *v.* Dowd, 128 U. S. 273, 32 L. Ed. 429, was a bankruptcy case, in which creditors secured by the fraudulent assignment were permitted to file their claims, but the fraud was one of law or constructive as distinguished from actual fraud, and the question of their right to participate was not even raised.

Claim based on fraudulent note and mortgage.—Where the only claim filed by the brother of a bankrupt against his estate was based on notes and a mortgage which are clearly fraudulent, he will be held bound by such action, and not be permitted to prove the claim as one for wages for labor and entitled to priority. In re Hemstreet, 139 Fed. Rep. 958.

The equity of the situation is not such as to require the court to place the claimant in any other position than that he assumed in filing his claim, and that is as the payee of the notes secured by the fraudulent mortgage. In that position the claimant is not entitled to the relief prayed for. It is possible that there is due some amount, as wages, from the bankrupt; but as the claimant has rested his claim upon the notes and mortgage he must abide the conclusion thereon, and, they being invalid, he is not entitled to other relief against the creditors. In re Hemstreet, 139 Fed. Rep. 958.

28. Reimbursement of consideration paid.—Money paid to an insolvent in a purchase of his property under circumstances showing a scheme to hinder and defraud his creditors cannot be made the basis of a claim against his estate in bankruptcy after the property has been taken possession of and sold by his trustee under order of the court. In re Lansaw, 118 Fed. Rep. 365.

"It needs no citation of authorities to support the proposition that, where a party makes a purchase of property from an insolvent debtor with the intent to hinder and delay his creditors, or where he takes from such debtor a larger amount of property than is necessary to satisfy his just debt against the insolvent, and this is done under circumstances indicating a conspiracy to cover up such excess of property from the other creditors of the insolvent, it is a fraudulent conspiracy; and, both parties being in pari delicto, the court will afford neither any relief, either by a restitution of the property conveyed or for a recovery of money paid in furtherance of such scheme." Here we have the general rule denying recovery of consideration paid recognized and applied in bankruptcy. In re Lansaw, 118 Fed. Rep. 365, 367. See, also, Sands *v.* Codwise, 4 Johns. Rep. 536, 598, 599; Garland *v.* Rives, 4 Rand. 282, 310.

turn of the consideration of a fraudulent conveyance, following the general rule.[29]

Personal Decree for Value.—But in Sheldon *v.* Parker (Neb.), 95 N. W. 1015, we have a case which inferentially holds the affirmative of the proposition for which we are contending. Here a husband and wife confederated to defraud creditors by transferring property of the husband to the wife, and such property was sold to an innocent third party so that it could not be reached by the creditors of the husband. It was held that where, in an action in the state court, by the trustee in bankruptcy of the husband, to set aside such conveyance and recover the property as fraudulently conveyed, such a state of facts was shown, so that the property itself could not be reached, a personal judgment might be entered against the wife for the proceeds of such sale by her, *provided* it appears or is fairly to be presumed that she still retains such proceeds or her separate estate has had the benefit thereof.[30]

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29. Same.—In re Friedman (Wis. 1908), 164 Fed. Rep. 131.

"It has been repeatedly held that, where a fraudulent conveyance is set aside by a court of equity, no accounting is to be taken of the money which the fraudulent grantee has actually invested to secure the fraudulent conveyance. This contention of claimants is disposed of by the following authorities: Ferguson *v.* Hillman, 55 Wis. 181, 190, 12 N. W. 389, is a leading case, where a large number of authorities to the same effect are collated and cited in the opinion. This doctrine was adhered to in Bank of Commerce *v.* Fowler, 93 Wis. 241, 245, 67 N. W. 423. See, also, In re Flick (D. C.), 105 Fed. 503, Burt *v.* Gotzian, 102 Fed. 937, 43 C. C. A. 59, and Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305, both of which were decisions of the circuit court of appeals of the Eighth circuit. The theory of these cases is that when a creditor participates in a scheme to defraud other creditors, and in furtherance thereof advances money or incurs expense, the entire transaction is contaminated by the fraud, and a court of equity will not practically pay a bonus upon the fraud by returning such advance or expense." In re Friedman, 164 Fed. Rep. 131, 143.

30. Personal decree for value.—The court distinguished Place *v.* Sedgwick, 95 U. S. 3, 24 L. Ed. 591, and Trust Co. *v.* Sedgwick, 97 U. S. 304, 24 L. Ed. 954 (holding such a personal decree improper), on the ground that no actual fraud was shown there in the wife, as in the case at bar, and said: "It would be opening too wide the door for fraud to hold that no personal judgment might be taken against the wife for property received from her husband with the fraudulent purpose of placing it beyond the reach of his creditors where it is shown that the proceeds of such property, although sold to an innocent party, are still retained by her, or where, from the circumstances of the case, such may fairly be presumed to be the case. If such was the law, the success of a scheme to defraud creditors would

Supposing that the fraudulent grantee in this case had been also a creditor of the bankrupt, it can be safely asserted that the recovery allowed in this case, which can be considered as the precise equivalent of the fraudulently conveyed property and practically its proceeds, was solely for the benefit of other creditors, and that no part of it could by any possibility have been decreed to such fraudulent grantee until the other creditors were paid in full. If this case was correctly decided it is *a fortiori* authority for the rule that a fraudulent vendee cannot share in bankruptcy in the proceeds of the property upon a debt due him.

CONCLUSIONS.

Finally, 1. The bankrupt act (§ 70e) *does not provide that the fraudulent grantee shall share* as a creditor in the proceeds of the property taken from him through the action of the trustee under the state law, its provision as to such property being that he "may recover the property so transferred," etc., in contradistinction to its declaration in § 67e (as to property conveyed within the four months), that the recovery is "for the benefit of creditors;" and there is *no ruling decision to that effect.* 2. The universal concensus of the cases is that the bankrupt courts must follow the state law, in administering the assets, as correctly deduced from the state statutes and decisions of the state courts of last resort, where the bankrupt law does not otherwise provide. 3 We think we have shown that under the statute of fraudulent conveyances of Virginia and West Virginia the fraudulent grantee cannot share as creditor in these proceeds. 4. Therefore it seems to follow, and we submit with much confidence that it does follow, that the bankrupt court, in distributing this fund, should follow what would be the rule in the state court and *deny* the fraudulent grantee *any right to share as creditor,* but merely give him any surplus over after the attacking creditors

depend solely on the ability of the wife to convert the money into cash before the creditors learned of the transaction, or had time to commence an action to reach the property. Cases may arise where the wife, being under the influence and dominion of the husband, may accept a conveyance from him, fraudulent on his part, and where the property may have been sold, and the proceeds expended in the support of the family, or for her own personal use. Under such circumstances, it would be exceedingly unjust to make the separate estate of the wife liable for the value of such property."

are paid in full, and this independently of the strong tendency shown by many of the decisions above quoted to make any actual fraudulent conduct of a creditor a bar to proving his claim in bankruptcy.[31]

JAMES F. MINOR,
Charlottesville, Va.

December, 1909.

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31. Addendum to former article.—Holmes *v.* Harshberger, 31 W. Va. 516, 7 S. E. 452, is a very peculiar case, and should have been considered in the previous article. There the vendor of land under title bond, afterwards took up the title bond, at the request of the vendee and admittedly to aid him in defrauding his creditors, and conveyed the property to vendee's wife, but reserving a vendor's lien for the price, none of which had been paid. It was held that such conveyance was void (correctly, of course), and that the defrauded creditors could subject the whole property without regard to the unpaid vendor's lien, as the debtor's property.

Holmes *v.* Harshberger, 31 W. Va. 516, 7 S. E. 452, cannot be supported by any reasoning based upon the purpose and spirit of the statute. Judge Snyder is perfectly correct in all he says as to the void character, as to creditors, of the deed taken to the wife and the reservation of the lien, but his application is entirely incorrect. Wipe out the deed as to the creditor attacking it, of course, but where does that leave the property? Does it not then belong to the vendor or former owner, and not the debtor who was merely his vendee under title bond, with a right in the vendee to call for a conveyance on paying the price, which here should include the advances made for the house? And the only claim of the attacking creditor is to his debtor's rights. He could claim the value of the work and labor put on the property by the debtor with intent to defraud him, but why he should have the right to claim what never did and never will belong to the debtor, i. e., the **unpaid-for** property, it is impossible to see. There has been no false credit given to the debtor, of which the creditor can possibly complain, as the vendor's claim to his purchase money and advances were in the recorded deed. He should not only have retained his lien for the $300 purchase money, but also for his advances, which constituted in reality a part of the price, and the attacking creditor could only rightfully claim the residue, i. e., the debtor's real interest. Judge Snyder was certainly possessed with the idea of **punishing** fraud in this case, not merely **protecting** creditors. He says none of the parties to the fraudulent transaction can claim any rights from it as against creditors. Well, they did not ask any, but merely to be relegated to their pre-existing rights, independently of the deed.

Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874, is not at all in point. The statute of fraudulent conveyances is not involved at all, and the case seems to me to be purely one of estoppel, specific performance, and subrogation to a volunteer; one who asks relief must have clean hands. There are no rights of creditors involved at all.

In case of deeds fraudulent as to creditors, if the debt be paid, the vendee retains the land, as it was only subject to the encumbrance of debt. But this does not apply here, which is a case of conveyance to a purchaser with notice of a prior conveyance of same property to

another. The very title to the land must be passed to the first purchaser. Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874.

The case of Pendery *v.* Allen, 53 O. St. Rep. 251, 41 N. E. 255, set out under "contra," ante, p. 510, was a case of constructive fraud only, and of a preferential assignment. So what it says as to actual fraud is mere obiter dictum. The Ohio Rev. Stat., § 6343, provides that "every conveyance * * * made * * * with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors at the suit of any creditor or creditors," and shall enure to the equal benefit of such creditor or creditors in proportion to the amount of their respective demands including those which are unmatured. This means all creditors. Pendery *v.* Allen, 53 O. St. 251, 41 N. E. 255.